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Supreme Court, U.S.
FILED

97 - 17 JUN 30 1997

No.

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In The

Supreme Court of the United States

October Term, 1996

MICHAEL T. HALL, TRUSTEE and MICHAEL T. HALL,

Petitioners,

vs.

FEDERAL FINANCIAL CO.,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the six year statute of limitations applicable to a cause of action on a promissory note brought by the Resolution Trust Corporation ("RTC") as a conservator or receiver, as set forth in 12 U.S.C. § 1821(d)(14) applies in a diversity action to a claim brought by the assignee of a promissory note from the RTC?

2. Should a federal court interpret the applicable federal statute, 12 U.S.C. § 1821(d) according to its plain meaning, or is the interpretation by a state court (in this case the Supreme Court of Virginia) of this federal statute binding on the federal courts?

LIST OF PARTIES

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed here appear in the caption of the case. There is no parent or subsidiary company of any party to be listed.

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Petitioners, Michael T. Hall, Trustee and Michael T. Hall, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 108 F.3d 46 and is reproduced in the Appendix filed herewith ("App") at App A, 1a. The Order of the Court of Appeals denying the petition for rehearing and suggestion for rehearing in banc is reproduced at App C, 14a. The unreported opinion of the district court in this case is reproduced at App B, 12a.

STATEMENT OF JURISDICTION

The decision of the Court of Appeals was entered on March 4, 1997. The Order of the Court of Appeals denying the petition for rehearing and suggestion for rehearing in banc was entered March 31, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The pertinent provision of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"), Pub. L. 101-73, 103 Stat. 183 (1989), 12 U.S.C. § 1821 is set forth below:

> (d) Powers and duties of Corporation as conservator or receiver.
>
> (14) Statute of limitations for actions brought by conservator or receiver.
>
> (A) In general.

Notwithstanding any provision of any contract, the applicable statute of limitations with regard to any action brought by the Corporation as conservator or receiver shall be —

(i) in the case of any contract claim, the longer of —

(I) the 6-year period beginning on the date the claim accrues; or

(II) the period applicable under State Law;

(B) Determination of the date on which a claim accrues

For purposes of subparagraph (A), the date on which the statute of limitations begins to run on any claim described in such subparagraph shall be the later of —

(i) the date of the appointment of the Corporation as conservator or receiver; or

(ii) the date on which the cause of action accrues.

STATEMENT OF THE CASE

On or about August 9, 1988, Michael T. Hall, Trustee, executed a Deed of Trust Note ("the Note") in the principal amount of $250,000, payable to Piedmont Federal Savings Bank ("Piedmont"). The Note was guaranteed by Michael T. Hall in his individual capacity. The maturity date of The Note was August 9, 1990, as plainly set forth on its face. The Note was not paid at maturity.

On October 8, 1992 Piedmont was placed into receivership by the United States Office of Thrift Supervision. Substantially all of the assets and liabilities of Piedmont Federal Savings Bank passed through to a new Federal mutual savings association, known as Piedmont Federal Savings Association. On the same day, Piedmont Federal Savings Association was placed into conservatorship by the Office of Thrift Supervision, and the Resolution Trust Corporation ("RTC") was appointed as its receiver.

On or about January 18, 1995, the RTC, as receiver of Piedmont Federal Savings Association, executed an allonge to The Note, assigning it to Federal Financial Co. ("FFC"), "WITHOUT RECOURSE, REPRESENTATION OR WARRANTY, EXPRESSED OR IMPLIED."

FFC filed this suit in the United States District Court for the Eastern District Court of Virginia on November 17, 1995, ten months after it acquired The Note. Hall filed a motion to dismiss based on Virginia's five-year statute of limitations. Following submission of briefs and oral argument, the district court sustained the plea of the statute of limitations and dismissed FFC's complaint. (App B, 12a).

On appeal, the United States Court of Appeals for the Fourth

Circuit reversed. (App A, 1a). Although the Court of Appeals agreed that state law, not federal common law, controlled its decision, it wrongly concluded that a recent decision by the Supreme Court of Virginia was binding upon it. In *Union Recovery Ltd. Partnership v. Horton*, 252 Va. 418, 477 S.E. 2d 521 (1996) (App D, 15a) the Supreme Court of Virginia held that the six year statute of limitations provided by § 1821(d)(14) applied to assignees of the RTC. Ostensibly bowing to and applying Virginia law, the Fourth Circuit accordingly held that the RTC six-year statute of limitations passed to FFC when FFC acquired the Note.

REASONS FOR GRANTING THE WRIT

This Court should grant the writ to clarify and refine the *Erie* doctrine and reassert the supremacy of the federal courts in interpreting federal statutes. Petitioners do not dispute the well established principle that state statutes of limitation are substantive rules of law and that a federal court, sitting in diversity, is obligated to apply state substantive law. In actuality, however, the Fourth Circuit did not apply the Virginia statute of limitations applicable to actions on a promissory note, which is indisputably five years. The district court correctly applied this statute of limitations to FFC's claim and dismissed the suit. (App B, 12a). By blindly following the decision of the Supreme Court of Virginia in *Union Recovery Ltd. Partnership, supra*, the Fourth Circuit adopted a state court's interpretation of federal law, namely § 1821(d)(14). Although a state's highest court is the final arbiter of state law, federal courts need not accept a decision of a state's highest court as a definitive interpretation of a federal statute.

This Court should also grant the writ in order to resolve a split between the federal circuit courts of appeals on the question of whether federal courts should employ a federal common law

rule of decision to determine whether § 1821(d)(14) is applicable to assignees of the RTC. As the Fourth Circuit recognized, "the overwhelming majority of the state and federal decisions that have addressed the issue" have concluded that state law is not applicable, and that the issue of whether § 1821(d)(14) should be applied to assignees of the RTC is to be determined by reference to principles of common law. 108 F.3d at 48. These decisions are exemplified by the Fifth Circuit decision in *FDIC v. Bledsoe*, 989 F.2d 805 (5th Cir. 1993). In fact, the *Bledsoe* analysis was adopted by the Supreme Court of Virginia in *Union Recovery*, 477 S.E. 2d at 524, 252 Va. at 424. (App D, 22a)

Without more specific guidance, lower courts will be confronted with two conflicting methods of analysis when interpreting a federal statute, § 1821(d)(14) — the Fifth Circuit analysis in *Bledsoe* that rejects state law and holds that common law principles should be applied, and the Fourth Circuit analysis that rejects common law principles and applies state law.

Finally, a writ should be granted in order to assure uniform interpretation and application of a federal statute on a nationwide basis. The decision of the Fourth Circuit below requires the federal courts to adopt a state court decision interpreting the applicability of a federal statute. It thus opens the door for conflicting application of a federal statute, depending upon the interpretation of that statute by the courts of the state in which the federal court is sitting.

I.

THE *ERIE* DOCTRINE DOES NOT CONTROL THE RESOLUTION OF ISSUES GOVERNED BY FEDERAL STATUTE.

This is a diversity action concerning a state law claim. Under familiar principles, the district court must apply the state

substantive law in which the district court is located, *i.e.*, Virginia, unless there exists a superseding federal statute. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1939). State statutes of limitations are substantive rules of law for *Erie* purposes, and thus the district court was obliged to apply the Virginia statute of limitations. *Guaranty Trust Co. v. York*, 326 U.S. 99, 110, 65 S. Ct. 1464, 89 L. Ed. 2079 (1945).

At the time the Note was executed (August 9, 1988) and on its maturity date (August 9, 1990), Title 8.3 of the Code of Virginia (1950) was in effect. Va. Code § 8.3-122(1)(a) provides that in the case of a time instrument, the cause of action accrues "on the day after maturity". It is undisputed that the Note is a time instrument. Accordingly, the cause of action for nonpayment of the Note accrued August 10, 1990, and the five year statute of limitations began to run on that date. Va. Code § 8.01-246(2); *Harris v. Tabler*, 232 Va. 75, 348 S.E. 2d 241 (1986). This action was not filed until November 17, 1995, which date is obviously beyond the five year statute of limitations. Consequently, FFC's claim would be time barred by the application of the Virginia statute of limitations.

FFC never disputed the conclusion that its claim is time barred if the Virginia statute of limitations is applied. Rather, FFC argued that it is entitled to the six-year statute of limitations found in the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), specifically 12 U.S.C. § 1821(d)(14).

It is undisputed that the six-year statute of limitations contained in FIRREA does not expressly apply to assignees of the RTC. Rather, relying on a series of federal and state cases, FFC asserted that "common law" principles entitled it to the benefit of the six-year statute of limitations contained in 12 U.S.C. § 1821(d)(14). *See FDIC v. Bledsoe*, 989 F.2d 805 (5th

Cir. 1993); *Mountain States Financial Resources Corp. v. Agrawal*, 777 F. Supp. 1550 (W.D. Okla. 1991); *N.S.Q. Associates v. Beychok*, 659 So. 2d 729 (La. 1995); *Investment Co. of the Southwest v. Reese*, 875 P.2d 1086 (N.M. 1994). The reasoning of these decisions is identical, namely, that federal courts should utilize common law principles when interpreting federal statutes:

> It is an axiomatic principle of statutory construction that in effectuating Congress' intent courts are to fill the inevitable statutory gaps by reference to the principles of the common law.
>
> As the statute at hand is silent as to the rights of assignees, we turn to the common law to fill the gap. Fortunately, while the statute is quiet, the common law speaks in a loud and consistent voice: *An assignee stands in the shoes of his assignor.*

Bledsoe, 989 F.2d at 810.

The Fourth Circuit explicitly rejected the approach adopted by *Bledsoe* and its progeny, stating that reliance on general common law principles "is misplaced". 108 F.3d at 48. Citing this Court's recent decision in *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 114 S. Ct. 2048, 129 L. Ed. 2d 67 (1994) the Fourth Circuit held "that no federal policy presents a sufficient justification for a federal common law rule of decision applying § 1821(d)(14) to assignees of the RTC." 108 F.3d at 49. Accordingly, the Fourth Circuit concluded, "we look to state law, here Virginia law, to determine the statute of limitations governing the rights of assignees of the RTC." 108 F.3d at 50.

Up to this point, petitioners have no quarrel with the analysis, reasoning or conclusion of the Fourth Circuit. Petitioners submit that the Fourth Circuit erred by concluding that the decision of the Supreme Court of Virginia in *Union Recovery Ltd. Partnership v. Horton*, 252 Va. 418, 477 S.E. 2d 521 (1996) is a decision of state substantive law, and thus binding on the federal court sitting in diversity. Rather, *Union Recovery* is a case where the Supreme Court of Virginia interpreted federal law (*i.e.* § 1821(d)(14)), not state law, and the Fourth Circuit wrongly deferred to the state court's interpretation of federal law.

Although this is a diversity action, it is established that the *Erie* doctrine is not applicable when the court is required to interpret federal law.

> The *Erie* doctrine does not apply . . . in matters governed by the federal Constitution or by acts of Congress. It is beyond cavil that we are not bound by a state court's interpretation of federal law regardless of whether our jurisdiction is based on diversity of citizenship or a federal question.

Grantham v. Avondale Industries Inc., 964 F.2d 471, 473-74 (5th Cir. 1992) (citations omitted). *See also Sola Electric Co. v. Jefferson Electric Co.*, 317 U.S. 173, 63 S. Ct. 172, 87 L. Ed. 165 (1942); *Keebler Co. v. Rovira Biscuit Corp.*, 624 F.2d 366 (1st Cir. 1980); *Commonwealth Edison Co. v. Gulf Oil Corp.*, 541 F.2d 1263 (7th Cir. 1976).

In *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 100 L. Ed. 2d 178, 108 S. Ct. 1717 (1988), this Court held that "Although state law generally supplies the rules of decision in federal diversity cases, it does not control the resolution of issues

governed by federal statute." 486 U.S. at 198, 108 S. Ct. at 1720 (citations omitted). Further, in *Western Air Lines, Inc. v. Board of Equalization of South Dakota*, 480 U.S. 123, 107 S. Ct. 1038, 94 L. Ed. 2d 112 (1987), this Court recognized the general principle that the meaning of words in a federal statute is a question of federal law, absent a clear indication by Congress to the contrary. 480 U.S. at 129, 107 S. Ct. at 1042.

It has been long established that the states lack the power to regulate the procedures in the federal courts. *Hanna v. Plumer*, 380 U.S. 460, 469-70, 85 S. Ct. 1136, 1142-43, 14 L. Ed. 2d 8 (1965). Likewise, state courts lack the power to make interpretations of federal statutes that are binding on the federal courts. In *Union Recovery*, supra, the Supreme Court of Virginia did not establish the six year statute of limitations for assignees of a note from the RTC as a matter of state law. Rather, this decision was based upon its interpretation of federal law. Significantly, *Union Recovery* expressly recognized the distinction between the Virginia statute of limitations, which was five years, and the six year federal statute of limitations under FIRREA. The Supreme Court of Virginia then held that the federal six year statute of limitations superseded the state five year statute of limitations.

> It [plaintiff] was further permitted to take the six-year statute of limitations of subsection A over the five-year statute of limitations available under state law.

252 Va. at 423, 477 S.E. 2d at 523.

Even though the Supreme Court of Virginia interprets 12 U.S.C. § 1821(d)(14) to extend to assignees of the RTC, this decision is not binding on the federal courts. It is first and foremost the right and the duty of the federal courts to interpret

and determine federal law. Whether or not the six year statute of limitations contained in § 1821(d)(14) is limited to the RTC, or is extended to its assignees, is purely a question of interpreting a federal statute, and should be determined by federal law, not state law.

II.

THE PLAIN MEANING OF § 1821(d)(14) DOES NOT EXTEND THE STATUTE OF LIMITATIONS TO ASSIGNEES OF THE RTC.

The first step in analyzing a statute must be an examination of the language of the statute itself. "In deciding a question of statutory construction, we begin of course with the language of the statute." *Demarest v. Manspeaker*, 498 U.S. 184, 187, 112 L. Ed. 2d 608, 614, 111 S. Ct. 599 (1991). The FIRREA provision upon which FFC relies states:

> (14) Statute of limitations for *actions brought by conservator or receiver*
>
> (A) In general. Notwithstanding any provision of any contract, the applicable statute of limitations *with regard to any action brought by the Corporation as conservator or receiver* shall be —
>
> (i) in the case of any contract claim, the longer of —
>
> (I) the 6-year period beginning on the date the claim accrues; or

> (II) the period applicable under State law;
>
> * * *
>
> (B) Determination of the date on which a claim accrues. For purposes of subparagraph (A), the date on which the statute of limitations begins to run on any claim described in such subparagraph shall be the later of —
>
> (i) the date of the appointment of the Corporation as conservator or receiver; or
>
> (ii) the date on which the cause of action accrues.

12 U.S.C. § 1821(d)(14) (emphasis supplied).

"The meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain . . . the sole function of the courts is to enforce it according to its terms." *Caminetti v. United States*, 242 U.S. 470, 485, 61 L. Ed. 442, 37 S. Ct. 192, 194 (1917).

This canon of statutory construction is settled. "The plain meaning of legislation should be conclusive, except in the 'rare cases (in which) the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.' " *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242, 103 L. Ed. 2d 290, 109 S. Ct. 1026, 1031 (1988). Judicial inquiry is complete if the language of a statute is unambiguous on its face, or in light of ordinary rules of statutory construction.

United States v. Morison, 844 F.2d 1057, 1064 (4th Cir. 1988). The courts are not free to replace the clear language of a statute "with an unenacted legislative intent." *United States v. Morison*, supra, at 1064, quoting from *INS v. Cardoza-Fonseca*, 480 U.S. 421, 453, 107 S. Ct. 1207, 1224, 94 L. Ed. 2d 434, 461 (1987) (Scalia, J. concurring).

The plain, clear and unambiguous language of 12 U.S.C. § 1821(d)(14) states that it is applicable solely to actions brought by the FDIC as conservator or receiver. It is striking how easily the Congress could have expressly extended the application of this statute to parties who acquire notes from the FDIC or the RTC. Merely adding four words "or any assignee thereof" would have resolved the issue. The statute would then read the way FFC desires the courts to rewrite it:

> (14) Statute of limitations for actions brought by conservator or receiver, *or any assignee thereof.*
>
> (A) In general. Notwithstanding any provision of any contract, the applicable statute of limitations with regard to any action brought by the Corporation as conservator or receiver, *or any assignee thereof,* shall be —

In *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 114 S. Ct. 2048 (1994) Justice Scalia, speaking for a unanimous Court, rejected the FDIC argument that the Court should fashion a federal common-law rule of decision in light of the policy interests behind FIRREA, stating unequivocally that "There is no federal general common law." 512 U.S. at __, 114 S. Ct at 2053, (citing *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). Only in "few and restricted" cases should the court create special

federal rules of decision where Congress has not addressed the issue expressly. Such cases are "limited to situations where there is a 'significant conflict between some federal policy or interest and the use of state law.' " 512 U.S. at __, 114 S. Ct. at 2055 (quoting *Wallis v. Pan American Petroleum Corp.* 384 U.S. 63 (1966)).

The Fourth Circuit properly applied *O'Melveny & Myers* to reject the reasoning of the *Bledsoe* line of cases that federal common law should be used to interpret § 1821(d)(14). The Fourth Circuit should have interpreted 12 U.S.C. § 1821(d)(14) according to its plain language, and held that the six year statute of limitations did not extend to assignees of the RTC. *Caminetti, supra.*

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DECIDED MARCH 4, 1997

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 96-1143

FEDERAL FINANCIAL COMPANY,

Plaintiff-Appellant,

v.

MICHAEL T. HALL, Trustee; MICHAEL T. HALL,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria.

James C. Cacheris, Chief District Judge.

(CA-95-1600-A)

Argued: January 31, 1997

Decided: March 4, 1997

Before MURNAGHAN, NIEMEYER, and MOTZ, Circuit Judges.

* * *

Appendix A

OPINION

DIANA GRIBBON MOTZ, Circuit Judge:

This appeal presents a single issue: whether, as a matter of federal law, the statute of limitations applicable to the Resolution Trust Corporation when it acts as receiver also applies to its assignees.

I.

The relevant facts are simple. Michael T. Hall, Trustee, executed a promissory note for $250,000.00 to Piedmont Federal Savings Bank (Piedmont) in Virginia. Hall failed to pay the note when it fell due on August 9, 1990. In October 1992, the Office of Thrift Supervision placed Piedmont into receivership and appointed the Resolution Trust Corporation (RTC) as its receiver. In late 1994 or early 1995, RTC assigned Hall's note to Federal Financial Corporation (FFC), an Illinois partnership. In November 1995, after Hall had refused to pay, FFC filed this diversity action in the Eastern District of Virginia. Hall moved to dismiss, asserting that Virginia's five-year statute of limitations to enforce the payment of a note had expired in August 1995, five years after this note's maturity date.

The parties do not dispute that if the RTC had retained the note, the applicable statute of limitations would have allowed the RTC six years from the date of receivership in which to bring its action. *See* 12 U.S.C.A. § 1821(d)(14) (West 1989 & Supp. 1996). As the RTC's assignee, FFC claimed that it should receive the benefit of the longer federal statute of limitations applicable to claims brought by the RTC. Unpersuaded, the district court dismissed the claim. Relying on its prior decision

in *WAMCO, III, Ltd. v. First Piedmont Mortgage Corp.*, 856 F. Supp. 1076 (E.D. Va. 1994), the court determined that a five-year state statute of limitations governing contract actions applied and barred FFC's cause of action. *See* Va. Code Ann. § 8.01-246(2) (Michie 1992). Although we agree with the district court that federal law does not govern the limitations period of assignees of the RTC, because of a recent clarification in state law we must nonetheless reverse.

II.

Our review of this legal question is *de novo*. *See United States v. Han*, 74 F.3d 537, 540 (4th Cir.), *cert. denied* 116 S. Ct. 1890 (1996). Congress enacted the statute of limitations at issue here as part of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. 101-73, 103 Stat. 183 (1989). The statute provides, in relevant part:

> (14) Statute of limitations for actions brought by conservator or receiver
>
> (A) In general
>
> Notwithstanding any provision of any contract, the applicable statute of limitations with regard to any action brought by the Corporation as conservator or receiver shall be —
>
> (i) in the case of any contract claim, the longer of —
>
> (I) the 6-year period beginning on the date the claim accrues; or

(II) the period applicable under State law;

. . .

(B) Determination of the date on which a claim accrues

For purposes of subparagraph (A), the date on which the statute of limitations begins to run on any claim described in such subparagraph shall be the later of —

(i) the date of the appointment of the Corporation as conservator or receiver; or

(ii) the date on which the cause of action accrues.

12 U.S.C.A. § 1821(d)(14) (West 1989 & Supp. 1996). While the statute mentions rights of "the Corporation," elsewhere defined as the FDIC, another part of FIRREA gives the RTC the same rights and powers in this context. *See* 12 U.S.C.A. § 1441a(b)(4)(A) (West Supp. 1996).

Section 1821(d)(14) is obviously silent with respect to its application to the RTC's assignees. Hall asserts that since the plain language of the statute indicates that Congress took no position on whether assignees also receive the benefit of this federal statute of limitations, assignees are bound by the state statute of limitations originally governing the instrument.

FFC, relying on the overwhelming majority of the state and

federal decisions that have addressed the issue, maintains that state law has no place in the analysis. *See FDIC v. Bledsoe*, 989 F.2d 805 (5th Cir. 1993); *Mountain States Fin. Resources Corp. v. Agrawal*, 777 F. Supp. 1550 (W.D. Okla. 1991); *N.S.Q. Associates v. Beychok*, 659 So.2d 729 (La. 1995); *Tivoli Ventures, Inc. v. Bumann*, 870 P.2d 1244 (Colo. 1994) (en banc); *Investment Co. of the Southwest v. Reese*, 875 P.2d 1086 (N.M. 1994); *Jackson v. Thweatt*, 883 S.W.2d 171 (Tex. 1994); *Cadle Co. II, Inc. v. Lewis*, 864 P.2d 718 (Kan. 1993). FFC asserts, as these courts have reasoned, that "courts are to fill the inevitable statutory gaps by reference to the principles of the common law" and while the federal statute is silent, "the common law speaks in a loud and consistent voice: *An assignee stands in the shoes of his assignor.*" *Bledsoe*, 989 F.2d at 810 (citing, among other sources, 6 Am. Jur. 2d *Assignments* § 102 (1963) and Restatement (Second) of Contracts § 336 cmt. b, illus. 3 (1979)).

Even *WAMCO III, Ltd. v. First Piedmont Mortgage Corp.*, 856 F. Supp. 1076 (E.D. Va. 1994), on which the district court relied, accepted this basic approach. Its holding differs from the majority view only because the *WAMCO* court read the common law differently. Under the *WAMCO* analysis, the RTC's right to the six-year statute of limitations is "personal to the assignor" and, therefore, under general common law principles, not assignable. *WAMCO*, at 1086 (citing 6A C.J.S. *Assignments* § 76 (1975)). Thus appellant, FFC, and appellee, Hall, share a reliance on general common law principles.

In view of recent Supreme Court guidance, we believe that reliance is misplaced.

Appendix A

III.

The Supreme Court has recently emphasized that cases requiring federal common law rules of decision are "few and restricted." *O'Melveny & Myers v. FDIC*, 114 S. Ct. 2048, 2055 (1994) (citation omitted). Courts should create federal common law rules only "where there is a significant conflict between some federal policy or interest and the use of state law." *Id.* (citation omitted); *Atherton v. FDIC*, 117 S. Ct. 666, 670 (1997). *See also Resolution Trust Corp. v. Maplewood Invs.*, 31 F.3d 1276, 1293-94 (4th Cir. 1994) (following Virginia law, not federal common law, in determining whether RTC is a holder in due course).

The technique of using common law principles to "fill the inevitable statutory gaps" finds its roots in Justice Jackson's concurring opinion in *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 468-72 (1942) (Jackson, J., concurring). Justice Jackson suggested that federal courts should "make [their] own law from materials found in common law sources." But *O'Melveny* summarily rejected the FDIC's reliance on "[g]enerally [a]ccepted [c]ommon [l]aw [p]rinciples." *O'Melveny*, at 2053. Furthermore, the *D'Oench, Duhme* majority (unlike Justice Jackson's concurrence) based its narrow federal rule of decision on strong "federal policy evidenced in the [Federal Reserve] Act to protect [the FDIC], a federal corporation, from misrepresentations. . . ." *D'Oench, Duhme*, 315 U.S. at 459. Thus, the *D'Oench, Duhme* holding may well fit into the "few and restricted" cases that the Supreme Court in *O'Melveny* held do require federal common law rules of decision.

Here, in contrast, there is no "significant conflict" between

a federal policy and the use of state law. Admittedly, allowing a state-by-state determination of whether § 1821(d)(14) applies to the RTC's assignees would disadvantage the federal government by reducing the value and marketability of the RTC's asset pool. But in *O'Melveny*, the Court found strikingly similar fears did not merit a federal common law rule of decision. *O'Melveny*, 114 S. Ct. at 2055. Specifically, the court held that state law determined whether a failed S&L's knowledge of its officers' fraudulent activity could be imputed to the FDIC as receiver.

In refusing to turn to federal common law, *O'Melveny* also noted that "[t]he rules of decision at issue here do not govern the *primary* conduct of the United States or any of its agents or contractors, but affect only the FDIC's rights and liabilities, *as receiver*, with respect to primary conduct on the part of private actors that has already occurred." *O'Melveny*, 114 S. Ct. at 2055 (emphasis added). In the case at hand, we are addressing conduct of *assignees* of the government agency receiver. These assignees are even one step further removed from "the primary conduct of the United States" than the government agency receiver whose role the *O'Melveny* court found to be too attenuated. We therefore conclude that no federal policy presents a sufficient justification for a federal common law rule of decision applying § 1821(d)(14) to assignees of the RTC.

Nor do we find persuasive the attempt of *Bledsoe* and its progeny to analogize to the body of law that has evolved from the majority decision in *D'Oench, Duhme & Co.*. The common law rule created in *D'Oench, Duhme* protects the FDIC from secret agreements made by a failed bank, a doctrine later codified in 12 U.S.C. § 1823(e). *See* 12 U.S.C.A. § 1823(e) (West Supp. 1996) ("No agreement which tends to diminish or defeat the

interest of the Corporation in any asset acquired by it under this section . . . shall be valid against the Corporation unless such agreement (A) is in writing. . . ."). We and several other Courts of Appeals have held that the *D'Oench, Duhme* rule protects the FDIC's assignees as well, even though § 1823(e) is silent with regard to assignees. *See, e.g. Carteret Sav. Bank v. Compton, Luther & Sons*, 899 F.2d 340 (4th Cir. 1990); *Newton v. Uniwest Fin. Corp.*, 967 F.2d 340, 347 (9th Cir. 1992); *Porras v. Petroplex Sav. Ass'n*, 903 F.2d 379 (5th Cir. 1990); *FDIC v. Newhart*, 892 F.2d 47 (8th Cir. 1989). *But see Motorcity of Jacksonville Ltd. v. Southeast Bank*, 83 F.3d 1317 (11th Cir. 1996) (en banc), *vacated sub nom. Hess v. FDIC*, 117 S. Ct. 760 (1997) (mem.) (vacating for reconsideration a case holding that the *D'Oench, Duhme* common law doctrine could exist beyond the limits of § 1823(e)). FFC argues that when FIRREA was enacted, Congress knew courts applied § 1823(e) to assignees and assumed that courts would take the same approach in interpreting § 1821(d)(14). According to FFC, making the new statute of limitations expressly applicable to assignees would have been surplusage.

Undoubtedly, "Congress is presumed to enact legislation with knowledge of the law. . . ." *United States v. Langley*, 62 F.3d 602, 605 (4th Cir. 1995) (en banc), *cert. denied* 116 S. Ct. 797 (1996) (citations omitted). In *Langley*, we applied this principle to determine which elements of a criminal offense had to be performed "knowingly." There, we employed Congress' presumed knowledge of the law to untangle the grammar of a set of statutory provisions. Here, we would be using this presumption to extend a benefit Congress specially created for federal agencies when they act as receivers or conservators to a party unmentioned in the statute. In view of recent Supreme Court pronouncements, we cannot justify this leap.

We recognize the strong policy reasons for a uniform federal rule extending § 1821(d)(14) to assignees of the RTC. And "[n]o one doubts the power of Congress to legislate rules for deciding cases like the one before us." *Atherton*, 117 S. Ct. at 670. However, we must remain mere observers in that process, for "when the terms of a statute are clear, . . . courts are 'not free to replace . . . [that clear language] with an unenacted legislative intent' " *United States v. Morison*, 844 F.2d 1057, 1064 (4th Cir. 1988) (alteration in original) (citing *INS v. Cardoza-Fonseca*, 480 U.S. 421, 453 (1987) (Scalia, J., concurring)). "Whether latent federal power should be exercised to displace state law is primarily a decision for Congress, not the federal courts." *Atherton*, 117 S. Ct. at 670 (citing *Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 68 (1966). *See also O'Melveny*, at 2054 (refusing to "adopt a court-made rule to supplement federal statutory regulation that is comprehensive and detailed").

IV.

Accordingly, we look to state law, here Virginia law, to determine the statute of limitations governing the rights of assignees of the RTC. *See O'Melveny*, 114 S. Ct. at 2053-54 (finding "matters left unaddressed in [FIRREA] are presumably left subject to the disposition provided by state law"); *see also FDIC v. Houde*, 90 F.3d 600, 604 (1st Cir. 1996) (same).

After the district court decided this case, but before it was argued before us, Virginia's highest court addressed precisely this issue. In *Union Recovery Ltd. Partnership v. Horton*, 477 S.E.2d 521 (Va. 1996), the Supreme Court of Virginia held that assignees of the RTC do receive the benefit of § 1821(d)(14). *See also National Enterprises, Inc. v. Moore*, 948 F. Supp. 567 (E.D. Va. 1996) (relying on *Horton* to find § 1821(d)(14) applicable to assignees under Virginia law). Thus, in this case,

state law happens to bring us by a different path to the same result that the *Bledsoe* cases reach through application of federal common law. But this may not always be so and when state and federal law diverge, we believe we must follow state law, unless and until Congress or the Supreme Court directs otherwise.

Therefore, applying Virginia law, we hold that the RTC's six year statute of limitations and later date of accrual passed to FFC with FFC's purchase of Hall's note. For this reason, FFC's claim against Hall was not time-barred, and the district court's decision must be

REVERSED.

MURNAGHAN, Circuit Judge, concurring:

The question before the Court is whether a six-year statute of limitations applies to claims brought by an assignee of a promissory note held by the RTC. Since I believe that Virginia law clearly holds that the six-year statute of limitations period applies to assignees, I would not reach the issue of whether the conclusion would be the same under FIRREA absent clearly established state law.

In the instant case, Hall asserts that the plain language of the statute indicates that Congress took no position on whether assignees should receive the six-year statute of limitations period provided to the RTC, and the Court should therefore look to state law to determine the statute of limitations period. FFC argues that 1) the statute grants a six-year statute of limitations to assignees of the RTC;* 2) common law principles generally

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* FFC concedes that the statute is silent regarding this matter. However, (Cont'd)

establish that the six-year statute of limitations applies to assignees; and 3) applying Virginia law, the six-year statute of limitations applies. *Union Recovery Ltd. Partnership v. Horton*, 477 S.E.2d 521 (Va. 1996).

As noted in the majority opinion, the overwhelming majority of state and federal decisions have interpreted the federal statute to grant to the assignee a six-year statute of limitations. *See e.g. FDIC v. Bledsoe*, 989 F.2d 805 (5th Cir. 1993); *Mountain States Fin. Resources Corp. v. Agrawal*, 777 F. Supp. 1550 (W.D. Okla. 1991); *N.S.Q. Associates v. Beychok*, 659 So.2d 729 (La. 1995); *Tivoli Ventures, Inc. v. Bumann*, 870 P.2d 1244 (Colo. 1994) (en banc); *Investment Co. of the Southwest v. Reese*, 875 P.2d 1086 (N.M. 1994); *Jackson v. Thweatt*, 883 S.W.2d 171 (Tex. 1994); *Cadle Co. II, Inc. v. Lewis*, 864 P.2d 718 (Kan. 1993). However, in the instant case, there is no need to interpret the federal statute. Virginia law clearly holds that an assignee stands in the shoes of the assignor, and that the assignee of a note from the RTC is entitled to the longer six-year statute of limitations.

Since I believe it is unnecessary for the Court to determine whether the federal statute applies, I concur as to Part IV of the opinion and concur in the result.

(Cont'd)
they argue that the statute must be read as to effectuate the legislative intent. They argue that Congress is presumed to enact legislation with knowledge of the law and that a "newly-enacted or revised statute is presumed to be harmonious with existing law and its judicial construct." *United States v. Langley*, 62 F.3d 602, 605 (4th Cir. 1995) (en banc) (quoting *Johnson v. First Nat'l Bank of Montevideo*, 719 F.2d 270, 277 (8th Cir. 1983), *cert. denied*, 465 U.S. 1012 (1984)). FFC argued that the statute must be read in the context of Congress's understanding that an assignee stands in the shoes of an assignor.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, ALEXANDRIA DATED DECEMBER 29, 1995

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria

CIVIL ACTION NO. 95-1600-A

FEDERAL FINANCIAL CO.

Plaintiff

v.

MICHAEL T. HALL, et al

Defendant

ORDER

UPON CONSIDERATION of the defendants' Motion to Dismiss, plaintiff's Memorandum in Opposition to Defendants' Motion to Dismiss and the Reply Memorandum; and upon reviewing the authorities and arguments of counsel, the Court being of the opinion, on the authority of *Wamco, III, Ltd. v. First Piedmont Mortg.,* 856 F. Supp. 1076 (E.D. Va. 1994), that the statute of limitations bars plaintiff's cause of action, it is accordingly ORDERED:

(1) that defendants' Motion to Dismiss is GRANTED; and

(2) that plaintiff's Complaint is DISMISSED with prejudice.

Appendix B

(3) The Clerk shall forward copies of this Order to all counsel of record.

s/ James C. Cacheris
United States District Judge

Alexandria, Virginia
December 29, 1995

APPENDIX C — PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING IN BANC OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT FILED MARCH 31, 1997

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 96-1143
CA-95-1600-A

FEDERAL FINANCIAL COMPANY

Plaintiff - Appellant

v.

MICHAEL T. HALL, Trustee; MICHAEL T. HALL

Defendants - Appellees

On Petition for Rehearing with Suggestion for Rehearing In Banc

The appellees' petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Patricia S. Connor
Clerk

APPENDIX D — OPINION OF THE SUPREME COURT OF VIRGINIA IN *UNION RECOVERY LTD. PARTNERSHIP v. HORTON*, 252 Va. 418 (1996)

UNION RECOVERY LIMITED PARTNERSHIP

V.

THOMAS E. HORTON, ET AL.

Record No. 960329

November 1, 1996

Present: All the Justices

A receiver's right to sue within a federal statute of limitations period is inherent in its possession of the instruments at issue in this case and is among the rights, remedies and benefits which are incidental to the thing assigned and not merely a right personal to the assignor and for its benefit only; therefore the trial court ruling dismissing the case is reversed, and the case is remanded.

Creditors' Rights — Statutes of Limitations — Applicable Period — Financial Institutions Reform, Recovery and Enforcement Act — Statutory Construction — Receivers — Common Law

* * *

JUSTICE KOONTZ delivered the opinion of the Court.

In this appeal we consider whether an assignee of a

promissory note from the Resolution Trust Corporation (RTC) is entitled to the benefit of the statute of limitations available under federal law to RTC as receiver of the insured depository institution which originally held the note. Adhering to the common law rule that an assignee acquires the rights of the assignor, we hold that the federal statute controls the limitations period.

BACKGROUND

The facts of the case are not in dispute. On June 8, 1989, Thomas E. Horton executed a promissory note in favor of Federal Savings Bank of Virginia, F.S.B. (Federal) in the principal amount of $80,000. A variable rate of interest was payable monthly on the note from August 1, 1989, and the principal was due "ON DEMAND, BUT IF NO DEMAND IS MADE THEN ON JULY 1, 1990." Robert J. Leipzig executed a partial guaranty of the note in the amount of $20,000.

Sometime prior to April, 1992, Horton defaulted on the note and Leipzig defaulted on the guaranty. On April 10, 1992, RTC was appointed receiver for Federal and assumed control of its assets, including the note and guaranty at issue. On June 26, 1995, RTC assigned the note and guaranty to Union Recovery Limited Partnership (Union Recovery).

On August 30, 1995, Union Recovery filed a motion for judgment against Horton and Leipzig to recover on the note and guaranty. Within the motion for judgment, Union Recovery asserted the applicability of the six-year statute of limitations afforded to RTC under the Financial Institutions Reform, Recovery and Enforcement Act (FIRREA). 12 U.S.C. § 1821(d)(14)(A)(i). Both Horton and Leipzig filed pleas in bar

contesting the application of the federal limitations period and asserting that any action on the note was barred by the running of the five-year statute of limitations provided for under Code § 8.01-246(2), which they alleged was the applicable state statute of limitations.

The parties filed briefs in support of their respective positions and presented argument to the trial court. By order entered November 17, 1995, the trial court sustained the pleas of the statute of limitations and dismissed the motion for judgment with prejudice.

Union Recovery filed a motion for reconsideration. In an opinion letter dated December 5, 1995 and adopted by reference in a subsequent order denying the motion for reconsideration, the trial court set forth the grounds for its decision. Citing *WAMCO, III, Ltd. v. First Piedmont Mortgage Corp.*, 856 F.Supp. 1076 (E.D. Va. 1994), the trial court held that the statute of limitations provided for in FIRREA was a right applicable only for suits brought by government chartered corporations. As such, the trial court reasoned, the right was personal to RTC, and Union Recovery could acquire only those rights RTC had under the note and guaranty instruments, not those which RTC had by virtue of its status as a receiver under FIRREA. We awarded Union Recovery an appeal.

APPLICATION OF STATE AND FEDERAL STATUTE OF LIMITATIONS PERIODS

Virginia Statute of Limitations

The note and its associated guaranty were executed in 1989 prior to the enactment of Title 8.3A, and, accordingly, this case

is governed by the rules found in superseded Title 8.3. The parties have consistently treated the note as a pure demand note although it provided for a specific payment date if no demand was made. Under the provisions of Code § 8.3A-108(c), absent a demand, a note of this type becomes payable at a definite time on the fixed date with the cause of action accruing on that date. Because the issue is not relevant to the ultimate determination of this appeal, we will assume, without deciding, that the parties have correctly applied the rules of superseded Title 8.3 in their treatment of the note as a pure demand note. Under former Code § 8.3-122(1)(b), the cause of action on a pure demand note accrued upon its execution. Formerly, demand notes were subject to the five-year statute of limitations applicable to contracts generally. Code § 8.01-246(2).* Accordingly, Federal was required to sue on the note before June 8, 1994 to avoid an effective plea in bar of the statute of limitations.

Federal Statute of Limitations under FIRREA

FIRREA, Pub. L. No. 101-72, 103 Stat. 277 (1989) (codified in disconnected sections of Titles 12 and 15 of the U.S. Code), governs the procedures under which federally chartered corporations acting as agents of the United States become receivers or conservators of failed federally insured financial institutions. Its principal application is to the Federal Deposit Insurance Corporation (FDIC). However, when acting as receiver of an insured depository institution, RTC is deemed to be an agent of the United States. 12 U.S.C. § 1441a(b)(1)(A). As such, RTC, as receiver, has the same rights and powers as does FDIC under FIRREA. 12 U.S.C. § 1441a(b)(4)(A). Thus, although created for different purposes, RTC and FDIC are in all respects

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* Title 8.3A now provides for a six-year statute of limitations on most forms of negotiable instruments. Code § 8.3A-118.

identically situated when acting as receivers in the name of the United States under FIRREA.

The relevant portions of FIRREA applicable to this appeal are found at 12 U.S.C. § 1821(d)(14)(A) and (B):

> (A) In general. Notwithstanding any provision of any contract, the applicable statute of limitations with regard to any action brought by the Corporation as conservator or receiver shall be —
>
> (i) in the case of any contract claim, the longer of —
>
> (I) the 6-year period beginning on the date the claim accrues; or
>
> (II) the period applicable under State law;
>
> . . . .
>
> (B) Determination of the date on which a claim accrues. For purposes of subparagraph (A), the date on which the statute of limitations begins to run on any claim described in such subparagraph shall be the later of —
>
> (i) the date of the appointment of the Corporation as conservator or receiver; or
>
> (ii) the date on which the cause of action accrues.

Appendix D

When RTC acquired the note and guaranty as receiver, it was entitled under FIRREA to institute actions on them under the longest period provided by the combined application of subsections A and B of 12 U.S.C. § 1821(d)(14). Under the provisions of subsection B, RTC was permitted to advance the date of accrual of the causes of action to April 10, 1992, the date of its appointment as receiver. It was further permitted to take the six-year statute of limitations of subsection A over the five-year statute of limitations available under state law. Accordingly, RTC had until April 9, 1998 to sue upon the note and guaranty.

DISCUSSION

It is well established law in Virginia that an assignee obtains his rights from the assignor, and, thus, he is said to "stand in the shoes" of the assignor when pursuing an action on the contract or instrument assigned. *See, e.g., National Bank and Trust Company at Charlottesville v. Castle,* 196 Va. 686, 692-93, 85 S.E.2d 228, 232 (1955). Thus, the sole question in this appeal is whether the statute of limitations contained in 12 U.S.C. 1821(d)(14)(A) and (B) applies to assignees of RTC, or do these assignees take their assignments subject only to the rights which would have accrued to the failed institution for which RTC is acting as receiver, thus becoming *de facto* assignees of the institution.

In *Mountain States Financial Resources Corp. v. Agrawal,* 777 F.Supp. 1550 (W.D. Okla. 1991), the first reported case to address the application of FIRREA's statute of limitations provisions to an assignee of an agent corporation of the United States, the court held that the federal statute of limitations applied to an assignee of FDIC. *Id.* at 1552. The court reasoned that:

Appendix D

> An assignee stands in the shoes of the assignor, and acquires all of the assignor's rights and liabilities in the assignment. This general principle and a strong public policy require that the FDIC's assignee acquire the six-year limitations period provided by § 1821(d)(14)(A).

Id.

Several courts have relied on the reasoning in *Mountain States* to extend to assignees of FDIC the six-year statute of limitations provided by 12 U.S.C § 1821(d)(14)(A)(i). *See, e.g., F.D.I.C. v. Bledsoe,* 989 F.2d 805 (5th Cir. 1993); *Remington Investments, Inc. v. Kadenacy,* 930 F.Supp. 446 (C.D. Cal. 1996); *White v. Moriarty,* 19 Cal. Rptr. 2d 200 (Cal. Ct. App. 1993); *Tivoli Ventures, Inc. v. Bumann,* 870 P.2d 1244 (Colo. 1994); *Cadle Co. II, Inc. v. Lewis,* 864 P.2d 718 (Kan. 1993), *cert. denied,* __ U.S. __, 114 S.Ct. 1613 (1994); *Central States Resources Corp. v. First National Bank,* 501 N.W.2d 271 (Neb. 1993). In addition, a recent decision of the Appellate Court of Illinois has applied this same reasoning to a suit brought by an assignee of RTC. *Twenty First Century Recovery, Ltd. v. Mase,* 665 N.E.2d 573 (Ill. Ct. App. 1996).

Disagreeing with the majority view, the court in *WAMCO,* the decision relied on by the trial court in this case, held that the five-year Virginia statute of limitations applied to a demand note assigned by RTC to WAMCO. *WAMCO,* 856 F.Supp. at 1088. In its analysis the court found that the statute plainly conferred the benefit of the six-year limitation on RTC in its status as receiver. As such, the court reasoned that the benefit is personal and, therefore, does not transfer to an assignee under

existing common law rule. *Id.* at 1086. The court further found that public policy alone could not supply the right where the statute was silent. *Id.*

We do not concur in the view expressed in *WAMCO* and adopt the view taken by the majority of other federal and state jurisdictions. We find that application of the common law, even without reference to the public policy this would promote, mandates the application of the longer limitations period. As expressed by the United States Court of Appeals for the Fifth Circuit in *Bledsoe,* we hold that where "statutes are absolutely silent on [a] matter[, i]t is an axiomatic principle of statutory construction that in effectuating Congress' intent courts are to fill the inevitable statutory gaps by reference to the principles of the common law." *Bledsoe,* 989 F.2d at 810.

The extended statute of limitations is merely a mechanism for providing the receiver with an adequate time to pursue those claims which the financial institution could not successfully pursue prior to its failure. As such, the receiver's right to sue within the statute of limitations period is inherent in its possession of the instruments at issue and would thus be among the " 'rights, remedies and benefits which are incidental to the thing assigned,' " *WAMCO,* 856 F.Supp. at 1086, and not merely a right " 'personal to the assignor and for [its] benefit only.' " *Id.* (citation omitted).

For these reasons, we will reverse the order of the trial court dismissing the motion for judgment and remand the case for further proceedings.

Reversed and remanded.

APPENDIX E — RELEVANT STATUTE

12 U.S.C.S. § 1821(d)

(d) Powers and duties of Corporation as conservator or receiver, (1) Rulemaking authority of Corporation. The Corporation may prescribe such regulations as the Corporation determines to be appropriate regarding the conduct of conservatorships or receiverships.

(2) General powers. (A) Successor to institution. The Corporation shall, as conservator or receiver, and by operation of law, succeed to —

(i) all rights, titles, powers, and privileges of the insured depository institution, and of any stockholder, member, accountholder, depositor, officer, or director of such institution with respect to the institution and the assets of the institution; and

(ii) title to the books, records, and assets of any previous conservator or other legal custodian of such institution.

(B) Operate the institution. The Corporation may (subject to the provisions of section 40 [12 USCS § 1831q]), as conservator or receiver —

(i) take over the assets of and operate the insured depository institution with all the powers of the members or shareholders, the directors, and the

officers of the institution and conduct all business of the institution;

(ii) collect all obligations and money due the institution;

(iii) perform all functions of the institution in the name of the institution which are consistent with the appointment as conservator or receiver; and

(iv) preserve and conserve the assets and property of such institution.

(C) Functions of institution's officers, directors, and shareholders. The Corporation may, by regulation or order, provide for the exercise of any function by any member or stockholder, director, or officer of any insured depository institution for which the Corporation has been appointed conservator or receiver.

(D) Powers as conservator. The Corporation may, as conservator, take such action as may be —

(i) necessary to put the insured depository institution in a sound and solvent condition; and

(ii) appropriate to carry on the business of the institution and preserve

and conserve the assets and property of the institution.

(E) Additional powers as receiver. The Corporation may (subject to the provisions of section 40 [12 USCS § 1831q]), as receiver, place the insured depository institution in liquidation and proceed to realize upon the assets of the institution, having due regard to the conditions of credit in the locality.

(F) Organization of new institutions. The Corporation may, as receiver —

(i) with respect to savings associations and by application to the Director of the Office of Thrift Supervision, organize a new Federal savings association to take over such assets or such liabilities as the Corporation may determine to be appropriate; and

(ii) with respect to any insured bank, organize a new national bank under subsection (m) or a bridge bank under subsection (n).

(G) Merger; transfer of assets and liabilities. (i) In general. The Corporation may, as conservator or receiver —

(I) merge the insured depository institution with

another insured depository institution; or

(II) subject to clause (ii), transfer any asset or liability of the institution in default (including assets and liabilities associated with any trust business) without any approval, assignment, or consent with respect to such transfer.

(ii) Approval by appropriate Federal banking agency. No transfer described in clause (i)(I) may be made to another depository institution (other than a new bank or a bridge bank established pursuant to subsection (m) or (n)) without the approval of the appropriate Federal banking agency for such institution.

(H) Payment of valid obligations. The Corporation, as conservator or receiver, shall pay all valid obligations of the insured depository institution in accordance with the prescriptions and limitations of this Act.

(I) Subpoena authority. (i) In general. The Corporation may, as conservator, receiver, or exclusive manager and for purposes of carrying out any power, authority, or duty with respect

to an insured depository institution (including determining any claim against the institution and determining and realizing upon any asset of any person in the course of collecting money due the institution), exercise any power established under section 8(n) [12 USCS § 1818(n)], and the provisions of such section shall apply with respect to the exercise of any such power under this subparagraph in the same manner as such provisions apply under such section.

(ii) Authority of board of directors. A subpoena or subpoena duces tecum may be issued under clause (i) only by, or with the written approval of, the Board of Directors or their designees (or, in the case of a subpoena or subpoena duces tecum issued by the Resolution Trust Corporation under this subparagraph and section 21A(b)(4), only by, or with the written approval of, the Board of Directors of such Corporation or their designees).

(iii) Rule of construction. This subsection shall not be construed as limiting any rights that the Corporation, in any capacity, might otherwise have under section 10(c) of this Act [12 USCS § 1820(c)].

Appendix E

(J) Incidental powers. The Corporation may, as conservator or receiver —

(i) exercise all powers and authorities specifically granted to conservators or receivers, respectively, under this Act and such incidental powers as shall be necessary to carry out such powers; and

(ii) take any action authorized by this Act, which the Corporation determines is in the best interests of the depository institution, its depositors, or the Corporation.

(K) Utilization of private sector. In carrying out its responsibilities in the management and disposition of assets from insured depository institutions, as conservator, receiver, or in its corporate capacity, the Corporation shall utilize the services of private persons, including real estate and loan portfolio asset management, property management, auction marketing, legal, and brokerage services, only if such services are available in the private sector and the Corporation determines utilization of such services is the most practicable, efficient, and cost effective.

(3) Authority of receiver to determine claims. (A) In general. The Corporation may, as receiver, determine claims in accordance with the requirements of this

subsection and regulations prescribed under paragraph (4).

(B) Notice requirements. The receiver, in any case involving the liquidation or winding up of the affairs of a closed depository institution, shall —

(i) promptly publish a notice to the depository institution's creditors to present their claims, together with proof, to the receiver by a date specified in the notice which shall be not less than 90 days after the publication of such notice; and

(ii) republish such notice approximately 1 month and 2 months, respectively, after the publication under clause (i).

(C) Mailing required. The receiver shall mail a notice similar to the notice published under subparagraph (B)(i) at the time of such publication to any creditor shown on the institution's books —

(i) at the creditor's last address appearing in such books; or

(ii) upon discovery of the name and address of a claimant not appearing on the institution's books within 30 days

after discovery of such name and address.

(4) Rulemaking authority relating to determination of claims. (A) In general. The Corporation may prescribe regulations regarding the allowance or disallowance of claims by the receiver and providing for administrative determination of claims and review of such determination.

(B) Final settlement payment procedure. (i) In general. In the handling of receiverships of insured depository institutions, to maintain essential liquidity and to prevent financial disruption, the Corporation may, after the declaration of an institution's insolvency, settle all uninsured and unsecured claims on the receivership with a final settlement payment which shall constitute full payment and disposition of the Corporation's obligations to such claimants.

(ii) Final settlement payment. For purposes of clause (i), a final settlement payment shall be payment of an amount equal to the product of the final settlement payment rate and the amount of the uninsured and unsecured claim on the receivership; and

(iii) Final Settlement payment rate. For purposes of clause (ii), the final

settlement payment rate shall be a percentage rate reflecting an average of the Corporation's receivership recovery experience, determined by the Corporation in such a way that over such time period as the Corporation may deem appropriate, the Corporation in total will receive no more or less than it would have received in total as a general creditor standing in the place of insured depositors in each specific receivership.

(iv) Corporation authority. The Corporation may undertake such supervisory actions and promulgate such regulations as may be necessary to assure that the requirements of this section can be implemented with respect to each insured depository institution in the event of its insolvency.

(5) Procedures for determination of claims. (A) Determination period. (i) In general. Before the end of the 180-day period beginning on the date any claim against a depository institution is filed with the Corporation as receiver, the Corporation shall determine whether to allow or disallow the claim and shall notify the claimant of any determination with respect to such claim.

(ii) Extension of time. The period described in clause (i) may be extended by a written agreement between the claimant and the Corporation.

(iii) Mailing of notice sufficient. The requirements of clause (i) shall be deemed to be satisfied if the notice of any determination with respect to any claim is mailed to the last address of the claimant which appears —

(I) on the depository institution's books;

(II) in the claim filed by the claimant; or

(III) in documents submitted in proof of the claim.

(iv) Contents of notice of disallowance. If any claim filed under clause (i) is disallowed, the notice to the claimant shall contain —

(I) a statement of each reason for the disallowance; and

(II) the procedures available for obtaining agency review of the determination to disallow the claim or judicial determination of the claim.

(B) Allowance of proven claims. The receiver shall allow any claim received on or before the date specified in the notice published under paragraph (3)(B)(i) by the receiver from any claimant which is proved to the satisfaction of the receiver.

(C) Disallowance of claims filed after end of filing period. (i) In general. Except as provided in clause (ii), claims filed after the date specified in the notice published under paragraph (3)(B)(i) shall be disallowed and such disallowance shall be final.

(ii) Certain exceptions. Clause (i) shall not apply with respect to any claim filed by any claimant after the date specified in the notice published under paragraph (3)(B)(i) and such claim may be considered by the receiver if —

(I) the claimant did not receive notice of the appointment of the receiver in time to file such claim before such date; and

(II) such claim is filed in time to permit payment of such claim.

(D) Authority to disallow claims. (i) In general. The receiver may disallow any portion of any claim by a creditor or claim of security,

preference, or priority which is not proved to the satisfaction of the receiver.

(ii) Payments to less than fully secured creditors. In the case of a claim of a creditor against an insured depository institution which is secured by any property or other asset of such institution, any receiver appointed for any insured depository institution —

(I) may treat the portion of such claim which exceeds an amount equal to the fair market value of such property or other asset as an unsecured claim against the institution; and

(II) may not make any payment with respect to such unsecured portion of the claim other than in connection with the disposition of all claims of unsecured creditors of the institution.

(iii) Exceptions. No provision of this paragraph shall apply with respect to —

(I) any extension of credit from any Federal home loan bank or Federal Reserve bank

to any insured depository institution; or

(II) any security interest in the assets of the institution securing any such extension of credit.

(E) No judicial review of determination pursuant to subparagraph (D). No court may review the Corporation's determination pursuant to subparagraph (D) to disallow a claim.

(F) Legal effect of filing. (i) Statute of limitation tolled. For purposes of any applicable statute of limitations, the filing of a claim with the receiver shall constitute a commencement of an action.

(ii) No prejudice to other actions. Subject to paragraph (12), the filing of a claim with the receiver shall not prejudice any right of the claimant to continue any action which was filed before the appointment of the receiver.

(6) Provision for agency review or judicial determination of claims. (A) In general. Before the end of the 60-day period beginning on the earlier of —

(i) the end of the period described in paragraph (5)(A)(i) with respect to any claim against a depository institution for which the Corporation is receiver; or

(ii) the date of any notice of disallowance of such claim pursuant to paragraph (5)(A)(i),

the claimant may request administrative review of the claim in accordance with subparagraph (A) or (B) of paragraph (7) or file suit on such claim (or continue an action commenced before the appointment of the receiver) in the district or territorial court of the United States for the district within which the depository institution's principal place of business is located or the United States District Court for the District of Columbia (and such court shall have jurisdiction to hear such claim).

(B) Statute of limitations. If any claimant fails to —

(i) request administrative review of any claim in accordance with subparagraph (A) or (B) of paragraph (7); or

(ii) file suit on such claim (or continue an action commenced before the appointment of the receiver),

before the end of the 60-day period described in subparagraph (A), the claim shall be deemed to be disallowed (other than any portion of such claim which was allowed by the receiver) as of the end of such period, such disallowance shall

be final, and the claimant shall have no further rights or remedies with respect to such claim.

(7) Review of claims. (A) Administrative hearing. If any claimant requests review under this subparagraph in lieu of filing or continuing any action under paragraph (6) and the Corporation agrees to such request, the Corporation shall consider the claim after opportunity for a hearing on the record. The final determination of the Corporation with respect to such claim shall be subject to judicial review under chapter 7 of title 5, United States Code [5 USCS §§ 701 et seq.].

(B) Other review procedures. (i) In general. The Corporation shall also establish such alternative dispute resolution processes as may be appropriate for the resolution of claims filed under paragraph (5)(A)(i).

(ii) Criteria. In establishing alternative dispute resolution processes, the Corporation shall strive for procedures which are expeditious, fair, independent, and low cost.

(iii) Voluntary binding or nonbinding procedures. The Corporation may establish both binding and nonbinding processes, which may be conducted by any government or private party, but all parties, including the claimant and the Corporation, must agree to the use of the process in a particular case.

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(iv) Consideration of incentives. The Corporation shall seek to develop incentives for claimants to participate in the alternative dispute resolution process.

(8) Expedited determination of claims. (A) Establishment required. The Corporation shall establish a procedure for expedited relief outside of the routine claims process established under paragraph (5) for claimants who —

(i) allege the existence of legally valid and enforceable or perfected security interests in assets of any depository institution for which the Corporation has been appointed receiver; and

(ii) allege that irreparable injury will occur if the routine claims procedure is followed.

(B) Determination period. Before the end of the 90-day period beginning on the date any claim is filed in accordance with the procedures established pursuant to subparagraph (A), the Corporation shall —

(i) determine —

(I) whether to allow or disallow such claim; or

(II) whether such claim should be determined pursuant to the procedures established pursuant to paragraph (5); and

(ii) notify the claimant of the determination, and if the claim is disallowed, provide a statement of each reason for the disallowance and the procedure for obtaining agency review or judicial determination.

(C) Period for filing or renewing suit. Any claimant who files a request for expedited relief shall be permitted to file a suit, or to continue a suit filed before the appointment of the receiver, seeking a determination of the claimant's rights with respect to such security interest after the earlier of —

(i) the end of the 90-day period beginning on the date of the filing of a request for expedited relief; or

(ii) the date the Corporation denies the claim.

(D) Statute of limitations. If an action described in subparagraph (C) is not filed, or the motion to renew a previously filed suit is not made, before the end of the 30-day period beginning on the date on which such action or motion may be filed in accordance with subparagraph

(B), the claim shall be deemed to be disallowed as of the end of such period (other than any portion of such claim which was allowed by the receiver), such disallowance shall be final, and the claimant shall have no further rights or remedies with respect to such claim.

(E) Legal effect of filing. (i) Statute of limitation tolled. For purposes of any applicable statute of limitations, the filing of a claim with the receiver shall constitute a commencement of an action.

(ii) No prejudice to other actions. Subject to paragraph (12), the filing of a claim with the receiver shall not prejudice any right of the claimant to continue any action which was filed before the appointment of the receiver.

(9) Agreement as basis of claim. (A) Requirements. Except as provided in subparagraph (B), any agreement which does not meet the requirements set forth in section 13(e) [12 USCS § 1823(e)] shall not form the basis of, or substantially comprise, a claim against the receiver or the Corporation.

(B) Exception to contemporaneous execution requirement. Notwithstanding section 13(e)(2) [12 USCS § 1823(e)(2)], any agreement relating to an extension of credit between a Federal home loan bank or Federal Reserve bank and any insured depository institution

> which was executed before the extension of credit by such bank to such institution shall be treated as having been executed contemporaneously with such extension of credit for purposes of subparagraph (A).

(10) Payment of claims. (A) In general. The receiver may, in the receiver's discretion and to the extent funds are available, pay creditor claims which are allowed by the receiver, approved by the Corporation pursuant to a final determination pursuant to paragraph (7) or (8), or determined by the final judgment of any court of competent jurisdiction in such manner and amounts as are authorized under this Act.

> (B) Payment of dividends on claims. The receiver may, in the receiver's sole discretion, pay dividends on proved claims at any time, and no liability shall attach to the Corporation (in such Corporation's corporate capacity or as receiver), by reason of any such payment, for failure to pay dividends to a claimant whose claim is not proved at the time of any such payment.

(11) Depositor preference. (A) In general. Subject to section 5(e)(2)(C) [12 USCS § 1815(e)(2)(C)], amounts realized from the liquidation or other resolution of any insured depository institution by any receiver appointed for such institution shall be distributed to pay claims (other than secured claims to the extent of any such security) in the following order of priority:

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(i) Administrative expenses of the receiver.

(ii) Any deposit liability of the institution.

(iii) Any other general or senior liability of the institution (which is not a liability described in clause (iv) or (v)).

(iv) Any obligation subordinated to depositors or general creditors (which is not an obligation described in clause (v)).

(v) Any obligation to shareholders or members arising as a result of their status as shareholders or members (including any depository institution holding company or any shareholder or creditor of such company).

(B) Effect on State law. (i) In general. The provisions of subparagraph (A) shall not supersede the law of any State except to the extent such law is inconsistent with the provisions of such subparagraph, and then only to the extent of the inconsistency.

(ii) Procedure for determination of inconsistency. Upon the Corporation's own motion or upon the request of any

person with a claim described in subparagraph (A) or any State which is submitted to the Corporation in accordance with procedures which the Corporation shall prescribe, the Corporation shall determine whether any provision of the law of any State is inconsistent with any provision of subparagraph (A) and the extent of any such inconsistency.

(iii) Judicial review. The final determination of the Corporation under clause (ii) shall be subject to judicial review under chapter 7 of title 5, United States Code [5 USCS §§ 701 et seq.].

(C) Accounting report. Any distribution by the Corporation in connection with any claim described in subparagraph (A)(v) shall be accompanied by the accounting report required under paragraph (15)(B).

(12) Suspension of legal actions. (A) In general. After the appointment of a conservator or receiver for an insured depository institution, the conservator or receiver may request a stay for a period not to exceed —

(i) 45 days, in the case of any conservator; and

(ii) 90 days, in the case of any receiver,

in any judicial action or proceeding to which such institution is or becomes a party.

(B) Grant of stay by all courts required. Upon receipt of a request by any conservator or receiver pursuant to subparagraph (A) for a stay of any judicial action or proceeding in any court with jurisdiction of such action or proceeding, the court shall grant such stay as to all parties.

(13) Additional rights and duties. (A) Prior final adjudication. The Corporation shall abide by any final unappealable judgment of any court of competent jurisdiction which was rendered before the appointment of the Corporation as conservator or receiver.

(B) Rights and remedies of conservator or receiver. In the event of any appealable judgment, the Corporation as conservator or receiver shall —

(i) have all the rights and remedies available to the insured depository institution (before the appointment of such conservator or receiver) and the Corporation in its corporate capacity, including removal to Federal court and all appellate rights; and

(ii) not be required to post any bond in order to pursue such remedies.

(C) No attachment or execution. No attachment

or execution may issue by any court upon assets in the possession of the receiver.

(D) Limitation on judicial review. Except as otherwise provided in this subsection, no court shall have jurisdiction over —

(i) any claim or action for payment from, or any action seeking a determination of rights with respect to, the assets of any depository institution for which the Corporation has been appointed receiver, including assets which the Corporation may acquire from itself as such receiver; or

(ii) any claim relating to any act or omission of such institution or the Corporation as receiver.

(E) Disposition of assets. In exercising any right, power, privilege, or authority as conservator or receiver in connection with any sale or disposition of assets of any insured depository institution for which the Corporation has been appointed conservator or receiver, including any sale or disposition of assets acquired by the Corporation under section 13(d)(1) [12 USCS § 1823(d)(1)], the Corporation shall conduct its operations in a manner which —

(i) maximizes the net present value return from the sale or disposition of such assets;

(ii) minimizes the amount of any loss realized in the resolution of cases;

(iii) ensures adequate competition and fair and consistent treatment of offerors;

(iv) prohibits discrimination on the basis of race, sex, or ethnic groups in the solicitation and consideration of offers; and

(v) maximizes the preservation of the availability and affordability of residential real property for low- and moderate-income individuals.

(14) Statute of limitations for actions brought by conservator or receiver. (A) In general. Notwithstanding any provision of any contract, the applicable statute of limitations with regard to any action brought by the Corporation as conservator or receiver shall be —

(i) in the case of any contract claim, the longer of —

(I) the 6-year period beginning on the date the claim accrues; or

(II) the period applicable under State law; and

(ii) in the case of any tort claim (other than a claim which is subject to section 21A(b)(14) of the Federal Home Loan Bank Act) [12 USCS § 1441a(b)(14)], the longer of —

(I) the 3-year period beginning on the date the claim accrues; or

(II) the period applicable under State law.

(B) Determination of the date on which a claim accrues. For purposes of subparagraph (A), the date on which the statute of limitations begins to run on any claim described in such subparagraph shall be the later of —

(i) the date of the appointment of the Corporation as conservator or receiver; or

(ii) the date on which the cause of action accrues.

(C) Revival of expired state causes of action. (i) In general. In the case of any tort claim described in clause (ii) for which the statute of limitation applicable under State law with

respect to such claim has expired not more than 5 years before the appointment of the Corporation as conservator or receiver, the Corporation may bring an action as conservator or receiver on such claim without regard to the expiration of the statute of limitation applicable under State law.

(ii) Claims described. A tort claim referred to in clause (i) is a claim arising from fraud, intentional misconduct resulting in unjust enrichment, or intentional misconduct resulting in substantial loss to the institution.

(15) Accounting and recordkeeping requirements. (A) In general. The Corporation as conservator or receiver shall, consistent with the accounting and reporting practices and procedures established by the Corporation, maintain a full accounting of each conservatorship and receivership or other disposition of institutions in default.

(B) Annual accounting or report. With respect to each conservatorship or receivership to which the Corporation was appointed, the Corporation shall make an annual accounting or report, as appropriate, available to the Secretary of the Treasury, the Comptroller General of the United States, and the authority which appointed the Corporation as conservator or receiver.

(C) Availability of reports. Any report prepared pursuant to subparagraph (B) shall be made available by the Corporation upon request to any shareholder of the depository institution for which the Corporation was appointed conservator or receiver or any other member of the public.

(D) Recordkeeping requirement. After the end of the 6-year period beginning on the date the Corporation is appointed as receiver of an insured depository institution, the Corporation may destroy any records of such institution which the Corporation, in the Corporation's discretion, determines to be unnecessary unless directed not to do so by a court of competent jurisdiction or governmental agency, or prohibited by law.

(16) Contracts with State housing finance authorities. (A) In general. The Corporation may enter into contracts with any State housing finance authority for the sale of mortgage-related assets (as such terms are defined in section 1301 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 [12 USCS § 1441a-1]) of any depository institution in default (including assets and liabilities associated with any trust business), such contracts to be effective in accordance with their terms without any further approval, assignment, or consent with respect thereto.

(B) Factors to consider. In evaluating the disposition of mortgage related assets to any

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State housing finance authority the Corporation shall consider —

(i) the State housing finance authority's ability to acquire and service current, delinquent, and defaulted mortgage related assets;

(ii) the State housing finance authority's ability to further national housing policies;

(iii) the State housing finance authority's sensitivity to the impact of the sale of mortgage related assets upon the State and local communities;

(iv) the costs to the Federal Government associated with alternative ownership or disposition of the mortgage related assets;

(v) the minimization of future guaranties which may be required of the Federal Government;

(vi) the maximization of mortgage related asset values; and

(vii) the utilization of institutions currently established in mortgage related asset market activities.

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(17) Fraudulent transfers. (A) In general. The Corporation, as conservator or receiver for any insured depository institution, and any conservator appointed by the Comptroller of the Currency or the Director of the Office of Thrift Supervision may avoid a transfer of any interest of an institution-affiliated party, or any person who the Corporation or conservator determines is a debtor of the institution, in property, or any obligation incurred by such party or person, that was made within 5 years of the date on which the Corporation or conservator was appointed conservator or receiver if such party or person voluntarily or involuntarily made such transfer or incurred such liability with the intent to hinder, delay, or defraud the insured depository institution, the Corporation or other conservator, or any other appropriate Federal banking agency.

(B) Right of recovery. To the extent a transfer is avoided under subparagraph (A), the Corporation or any conservator described in such subparagraph may recover, for the benefit of the insured depository institution, the property transferred, or, if a court so orders, the value of such property (at the time of such transfer) from —

(i) the initial transferee of such transfer or the institution-affiliated party or person for whose benefit such transfer was made; or

(ii) any immediate or mediate transferee of any such initial transferee.

(C) Rights of transferee or obligee. The Corporation or any conservator described in subparagraph (A) may not recover under subparagraph (B) from —

(i) any transferee that takes for value, including satisfaction or securing of a present or antecedent debt, in good faith; or

(ii) any immediate or mediate good faith transferee of such transferee.

(D) Rights under this paragraph. The rights under this paragraph of the Corporation and any conservator described in subparagraph (A) shall be superior to any rights of a trustee or any other party (other than any party which is a Federal agency) under title 11, United States Code.

(18) Attachment of assets and other injunctive relief. Subject to paragraph (19), any court of competent jurisdiction may, at the request of —

(A) the Corporation (in the Corporation's capacity as conservator or receiver for any insured depository institution or in the Corporation's corporate capacity with respect to any asset acquired or liability assumed by the Corporation under section 11, 12, or 13 [12 USCS § 1821, 1822, or 1823]); or

(B) any conservator appointed by the Comptroller of the Currency or the Director of the Office of Thrift Supervision, issue an order in accordance with Rule 65 of the Federal Rules of Civil Procedure, including an order placing the assets of any person designated by the Corporation or such conservator under the control of the court and appointing a trustee to hold such assets.

(19) Standards. (A) Showing. Rule 65 of the Federal Rules of Civil Procedure shall apply with respect to any proceeding under paragraph (18) without regard to the requirement of such rule that the applicant show that the injury, loss, or damage is irreparable and immediate.

(B) State proceeding. If, in the case of any proceeding in a State court, the court determines that rules of civil procedure available under the laws of such State provide substantially similar protections to such party's right to due process as Rule 65 (as modified with respect to such proceeding by subparagraph (A)), the relief sought by the Corporation or a conservator pursuant to paragraph (18) may be requested under the laws of such State.

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